The Parliament of the Commonwealth of Australia

THE DISCUSSION PAPER ON REVIEW OF BROADCASTING REGULATION:

A CRITIQUE

Report from the House of Representatives
Standing Committee on Transport,
Communications and Infrastructure

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CONTENTS

		PAGE
	PREFACE	vi
1.	**SUMMARY**	1
	Introduction	1
	General Comments	2
	Action for Change	5
2.	**SCOPE OF THE LEGISLATION**	9
	The Committee Report	9
	The Discussion Paper	9
	Comments on the Discussion Paper	10
	Conclusions	12
3.	**OBJECTIVES OF THE ACT**	13
	The Committee Report	13
	The Discussion Paper	13
	Comments on the Discussion Paper	14
	Conclusions	17
4.	**PLANNING OF SERVICES**	19
	The Committee Report and the Discussion Paper	19
	Comments on the Discussion Paper	19
	Conclusions	20
5.	**ALLOCATION OF LICENCES**	21
	The Committee Report	21
	The Discussion Paper	21
	Comments on the Discussion Paper	21
	Conclusions	24
6.	**PROGRAM CONTENT**	27
	The Committee Report	27
	The Discussion Paper	27
	Comments and Conclusions on the Discussion Paper	27

7.	**PERFORMANCE REVIEW**	29
	The Committee Report	29
	The Discussion Paper	29
	Comments on the Discussion Paper	30
	Conclusions	31
8.	**SANCTIONS**	33
	The Committee Report	33
	The Discussion Paper	33
	Comments on the Discussion Paper	34
	Conclusions	36
9.	**OWNERSHIP CHANGES**	37
	The Committee Reports	37
	The Discussion Paper	38
	Comments on the Discussion Paper	38
	Conclusions	39
10.	**LEGALISM AND INQUIRY PROCEDURES, AND THE APPEALS PROCESS**	41
	The Committee Report	41
	The Discussion Paper	41
	Comments on the Discussion Paper	41
	Conclusions	42

PREFACE

This is the third report on broadcasting from the House of Representatives Standing Committee on Transport, Communications and Infrastructure. The first two reports covered the role and functions of the Australian Broadcasting Tribunal. The Committee is inquiring at the moment and should present a report shortly on new broadcasting-related services, particularly pay television.

The two reports and the inquiry relate to the two references on broadcasting the Committee received from the former Minister for Transport and Communications. This third report is different. It is a response to a Discussion Paper, Review of Broadcasting Regulation, issued by the Department of Transport and Communications.

Taken together the scope of the two references are as wide as that of the Discussion Paper. The two references are current and will remain so until the House of Representatives is dissolved or expires because of the effluxion of time. The Paper calls for public comment by 15 September 1989. The only public comment the Committee can make is by report to the House.

This report, our critique of the Discussion Paper, falls within the terms of reference given to the Committee by the former Minister and is necessitated by concern that the Discussion Paper is a document of sub-standard quality which does not make a worthwhile contribution to substantial reform of broadcasting regulation.

Revisions, as suggested at the end of the Summary, should go a long way towards rectifying this deficiency.

JOHN SAUNDERSON, MP
Chairman
30 August 1989

1: SUMMARY

Introduction

1.1 In November 1987 the House of Representatives Standing Committee on Transport, Communications and Infrastructure received two references on broadcasting from the former Minister for Transport and Communications, Senator the Hon Gareth Evans, QC. Clause (p) of Sessional Order 28(B) gives the Committee leave to report from time to time. Thus both references are current and will remain so until the House is dissolved or expires because of the effluxion of time.

1.2 The Committee has reported twice on its first reference which covered the role and functions of the Australian Broadcasting Tribunal in regulating the Australian commercial broadcasting sector. The Committee has not reported as yet on the second reference - 'the possibilities for the development of, and the appropriate means of regulating, new broadcasting-related services, including in particular Pay Television...'

1.3 There are interconnections between these two references as there are strong connections between almost everything in the regulation of broadcasting. These connections have been referred to as the 'seamless robe' of broadcasting: that finance, structure and technical developments are all interrelated and changes in one area could affect the entire structure.[1]

1.4 Taken together, the scope of these two references is as wide as the scope of the Discussion Paper prepared by the Department of Transport and Communications under the guidance of a steering committee. This steering committee was made up of three officials from the Department (the Secretary, an Associate Secretary and the First Assistant Secretary, Broadcasting Policy), and, the Chairperson of the Australian Broadcasting Tribunal.

1.5 The Discussion Paper says it is not a response, government or departmental, to the Committee's main report on the role and functions of the Tribunal.[2] This is correct. Responses to reports from parliamentary committees are made by relevant Ministers in the Senate or the House. The Paper calls for public comment by 15 September 1989. The only comment the Committee can make is by report to the House. This comment is made imperative by the concern of the Committee that the Discussion Paper may be used as a white paper blueprint for government decision-making in this area when the Paper is one of poor quality. It therefore makes an inadequate contribution to policy formulation aimed at substantial reform of the *Broadcasting Act 1942*.

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[1]Australia, Parliament 1988, *The Role and Functions of the Australian Broadcasting Tribunal: Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure*, Parliamentary Paper No 263/1988, Canberra, p.2. Referred to in later citations as PP 263/1988.

[2]Department of Transport and Communications, Broadcasting Review Group, *Review of Broadcasting Regulation, Discussion Paper*, July 1989, p.1. Referred to in later citations as the DP.

General Comments

1.6 In its chapters two through to ten the critique of the Committee corresponds to the sections of the Discussion Paper. Thus from chapter 2 onwards the headings are identical to those of the Paper. The Summary (chapter 1) is different. It brings together the comments made on the various sections of the Paper and, by doing so, looks at it as a whole.

1.7 This chapter then discusses some basic issues related to changing the broadcasting legislation and concludes by putting forward a number of proposals designed to improve substantially the quality of the Paper.

1.8 From the lack of precision of its stated aim in the preface virtually right through section after section the Discussion Paper is misleading, inconsistent, sometimes contradictory, and proposes significant increases in the powers of the Australian Broadcasting Tribunal based on unsubstantiated assertions or without any rationale.

1.9 One of our major criticisms of the Paper is that it is not what it purports to be. In several places the Discussion Paper describes itself as being deregulatory. The introduction says the 'general direction adopted is one of deregulation where appropriate'. Later on there is reference to 'a less detailed prescription of constraints, consistent with a trend towards deregulation' and that section concludes with the statement that putting objectives in legislation is 'one aspect of the safeguards for a more deregulated system'.[3]

1.10 Is the approach of the Discussion Paper deregulatory? It is said that '(g)overnment regulation of economic activity involves intervention by government in the market process so as to impinge directly or indirectly on the economic decisions made by individuals, groups or companies in the private sector'.[4] In broadcasting this intervention represents direct means of regulation such as prohibitions, directions or requirements sometimes enforced by penalties for non-compliance. In other words, broadcasting regulation encompasses controls on the behaviour of licensees exercised by the Tribunal. Deregulation should have an opposite meaning: the removal or reduction of such controls.

1.11 When one goes through the various sections of the Paper it becomes clear that the whole tenor and thrust of options, proposals or suggestions is to increase controls or the power of the Tribunal over the behaviour of licensees rather than to reduce such controls or such power. This conclusion applies mainly to existing services because it is difficult to deregulate that which does not exist! For services not yet introduced the extent of regulation can be gauged by the choice of options which result in more or less regulation.

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[3]DP, paras 1.1.3, 3.3.5 and 3.4.3.

[4]R Castle, The Deregulation Debate, *Current Affairs Bulletin*, Vol 63(2) July 1986, pp.24-32.

1.12 The Discussion Paper envisages the regulation of Video and Audio Entertainment Information Services (VAEIS), by arguing that otherwise the problems experienced with such services would be perpetuated.[5] This must result in more regulation.

1.13 One of the purposes of putting objectives in the Act is to give the Tribunal 'wider discretionary powers'. The Committee has said that this is window dressing, a superficial justification for making the exclusive licensing criteria non-exclusive (see paragraphs 3.8 to 3.11 of this critique). As can be seen from an example of the 'deficiency' of the exclusive criteria used in the Paper, wider discretion enables the Tribunal to extend the 'fit and proper' criterion to each and every employee of a commercial broadcasting station. The McCarthyst implications of this increased power (control) should not be allowed to go unnoticed or unchallenged (see paragraphs 5.9 and 5.10).

1.14 'Performance Reviews' also increase the control of the Tribunal over licensees. It could be said that such reviews reflect changed circumstances. This may be so but they end up giving the ABT more power than it has at present over the behaviour of licensees. They are also related to integrated planning which looks very much like a backdoor entrance for Tribunal input into policy development on communications matters outside broadcasting and policy development on new services such as cable television.

1.15 The section on ownership changes is a rationalisation of the existing system. This could reduce the resources used but will not result in any major reduction of control. On the contrary, the trustee system represents increased control because it limits what a purchaser can do during the period of trusteeship when no such limits exist today. Likewise, changes to inquiry procedures and abolition of appeals to the Administrative Appeals Tribunal have very little to do with more or less regulation. They do not affect directly the power the Tribunal has to give directions to licensees.

1.16 The only possible area of deregulation mentioned in the Paper is the allocation of licences where the use of the tender system may represent a reduction in the power of the Tribunal. Everything else points to increases in Tribunal powers, increases in its ability to affect decisions of licensees.

1.17 In two significant ways the Paper increases the power of the Tribunal outside areas of control over decisions of licensees. It supports abolition of appeals to the Administrative Appeals Tribunal from decisions of the ABT. It also want to abolish the Ministerial power to initiate prosecutions under the Act and give this power to the Director of Public Prosecutions (DPP). Thus the ABT can go direct to the DPP.

1.18 When all this is added up the Discussion Paper is bestowing virtually unfettered power on the Broadcasting Tribunal. This makes a mockery of the statement that the system is being deregulated. Such a claim is extremely misleading and merely underlines the poor quality of the Paper.

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[5]DP, para 2.3.2.

1.19 There are a few bright spots and many shortcomings in the Paper. A major shortcoming is the absence of a clear relationship between perceived problems and suggested solutions. This is very serious because as a result there is no rational basis for the suggestions made. They are arbitrary. This deficiency exists in the sections on objectives in legislation and sanctions (see paragraphs 3.8 to 3.11 and 8.5 to 8.10). A perceived major deficiency in the current system is said to be **'a view'** that the powers of the Tribunal are inadequate. The Discussion Paper proposes strong and punitive measures based on **such views and other assertions.**

1.20 There is very little reasoning in the Paper and much of what is there is of poor quality. This is evident in the section on the scope of legislation. The proposal is for a modular approach which takes away from the Parliament some of its legislative power and invests this power in the Minister or the Tribunal. This drastic step is supported by the **claim** that the existing system **'is expensive in terms of ... Parliamentary...' resources**. One of the major functions of the Parliament is legislative. To reduce the ambit of this function with the disarming claim of reducing resources used or the trivial claim of repetition in legislation is to clutch at straws (see paragraphs 2.7 to 2.12).

1.21 Most of those who favour regulation want the exclusive licensing criteria made non-exclusive. One reason advanced is that exclusiveness promotes legalism and judicial review thus resulting in increased costs and delays in the commencement of new services. But almost in the same breath the Paper defeats its own argument.

1.22 The alternative possibility is ignored, namely, that deficiencies could be a product of the merit system of awarding commercial broadcasting licences. The Paper says that Tribunal selection of the most suitable applicant **inevitably involves subjective and discretionary judgements**. It does **not** mention the windfall gains worth millions of dollars to the successful applicant.

1.23 In these circumstances it is no wonder that legalism and legal challenge exists, and will continue to exist unless the merit system is changed. Making the criteria non-exclusive and abolishing appeals to the AAT does not tackle the problem at its source (see paragraphs 5.13 to 5.17).

1.24 A more pertinent example of poor quality is in respect of networking. At no place in the Discussion Paper is it argued that there is or could be 'too much' networking. Instead this is assumed and a 'network of regulation' is built on this assumption. This starts with the registration of network arrangements, moves on to network reviews, then sanctions on networking and finishes with such networking being a factor in ownership changes. This is heavy handed regulation, all based on a perceived view that networking is important, could get out of hand and therefore should be controlled (see paragraphs 9.11 to 9.15).

1.25 There are clear and important inconsistencies in the Paper. The first is on the modular approach. Having argued for it, albeit not convincingly in the view of the Committee, the Paper turns around later and belittles the entire concept! It

does this when it says that developments are leading inexorably to ever greater difficulties in defining modules and that technological change is going to make regulation harder and harder in the future (see paragraph 2.15).

1.26 The second clear inconsistency is on removing appeals to the Administrative Appeals Tribunal. The argument used in the past and repeated in the Paper is that the ABT is an expert body. Yet the Paper **argues against itself** when it says the Tribunal makes many subjective, discretionary and value judgements. This admission takes much of the gloss from the expert body argument which is exposed for what it is - people with more than average knowledge pretending to be the font of all wisdom.

Action for Change

1.27 There are several basic steps that have to be taken in updating the Broadcasting Act and making broadcasting regulation relevant to the age in which we live. Above all change has to be guided firmly by clarity of purpose. In the opinion of the Committee there are at least three basic issues which set the agenda for change.

1.28 The first is accepting or rebutting the implications in the Discussion Paper about licences being held in public trust and not attracting property-type rights. If this means that profitability or economic viability is of no concern for the Tribunal when it sets standards or conditions arising from performance reviews or licence hearings, then this view should be made explicit. If the above is not the meaning, some explanation is necessary.

1.29 If the former is the view being pushed, which of course can be denied because of the imprecision of the language used, the Committee would disagree with it. To agree is to remove commercialism from the commercial enterprise! Nevertheless, this extreme view serves to raise the question of what role there is for the Tribunal in improving quality if the bottom line, and the ratings which attach to it, become so important.

1.30 This last comment takes this critique into two interrelated areas. The first has to do with the role of competition vis-a-vis that of regulation. The terms of reference of the Department's Pay Television report included the general desire of the Government to increase the competitiveness of Australian industry.[6] Yet this concept is absent from the Discussion Paper which talks about competition and free markets mainly in the context of removing commercial viability as a licensing criteria.

1.31 It is necessary to address directly the impact of effective competition on regulation and regulatory regimes which the Paper refers to in passing.[7] The creation and development of the Special Broadcasting Service, the introduction of aggregation and the possible introduction of pay television is introducing more and more choice if not diversity of programming. In these circumstances the role

[6]Department of Transport and Communications, *Future Directions for Pay Television in Australia*, February 1989, Canberra, p.3.
[7]DP, para 7.3.31.

of regulation should be examined closely. An option is for the legislation to give the Minister the power to exempt certain areas (markets) from certain types of regulations or types of reviews if the Minister finds competition in these markets to be effective.

1.32 The roles of the national broadcasters and public broadcasters have also to be introduced into the equation. It is surprising that the Discussion Paper did not do this. The error of omission is compounded by the possibility, if pay television is introduced, of having public access channels on television. This raises a fundamental question for the future and this is whether there is any role for regulation in increasing the diversity of program choice.

1.33 In respect of the various proposals/options in the Discussion Paper the conclusions reached by the Committee are as follows:

Scope of the Legislation

(a) the modular approach of legislative structures should be discarded;

(b) legislation should be based on type of service and whether there be one omnibus or several acts of Parliament should not be a relevant factor;

Objectives of the Act

(c) inserting objectives in legislation is supported but they should **never** be the sole basis for giving the Tribunal wider including discretionary powers;

(d) the concept of the Ministerial statement recommended by the Committee should be introduced in the legislation;

(e) wherever possible the powers of the Tribunal should be made explicit and not inferred from objectives or removal of the exclusive criteria;

Planning of Services

(f) the concept of the integrated plan should be examined further;

(g) this examination should include an appraisal of the role and powers of the Tribunal in the preparation of an integrated plan and in non-broadcasting type services;

Allocation of Licences

(h) the relevance of commercial viability as a licensing criteria should be examined in the context of the introduction of pay television;

(i) a guiding principle should be the equal treatment or equal responsibilities for competing services;

(j) criteria should be developed to permit rational choice between the various options of allocation of licences;

Program Content

(k) criteria should be developed to determine the type of regulation for different services;

Performance Review

(l) the measurement of listener and viewer acceptance of commercial broadcasting should be accepted as an important indicator of performance;

(m) the concept of public trustee and of the licence not attracting property-type rights should be explained and its use as a denial of the profit motive in commercial broadcasting rejected;

(n) the option of giving the Minister legislative power to exempt certain areas (markets) from certain types of regulations or reviews, if the Minister found competition in the markets to be effective, should be considered;

(o) the need for network reviews should be based on argument not presumptions and this could be achieved by implementing the Committee recommendation on an inquiry into minimum hours of local programming;

(p) the need for performance reviews should be examined again if pay television is introduced and after it achieves some market penetration;

Sanctions

(q) the entire section on sanctions should be discarded;

(r) the Department of Transport and Communications should establish a clear case for change and the prime aim of sanctions should be to improve quality rather than 'to punish' licensees;

Ownership Changes

(s) the general thrust of the Paper should be supported;

(t) the discretionary power of the Tribunal to take into account networking arrangements should be argued and not presumed;

Legalism and Inquiry Procedures, and the Appeals Process

(u) the Tribunal is not a court and the matters of parliamentary control over Tribunal inquiry procedures should be subject to parliamentary inquiry; and

(v) the inconsistent and contradictory arguments used to seek abolition of appeals to the Administrative Appeals Tribunal from ABT decisions should be referred to the Administrative Review Council which is reviewing this matter.

2: SCOPE OF THE LEGISLATION

The Committee Report

2.1 Under a section called The New Technologies, the Committee report made some general comments on the implications for regulation of the new and developing technologies. It reached no definitive position on this matter because of the existence of a reference (now current), which asked the Committee to examine the possibilities for the development of, and appropriate means of regulating, new broadcasting-related services, in particular pay television.

2.2 The report said that the basic problem with the current regulatory regimes is that they are based on the method of delivery. This has resulted in similar services delivered by different technologies being regulated in dissimilar ways in different Acts of Parliament. The report went on to say that the type of change the Committee has been made aware of most is regulation in a single Act of all services which fall within a more expansive definition of broadcasting. This would mean that VAEIS and pay television would come under the same regime as current radio and television stations. The Tribunal would thus have responsibility for all broadcasting-type services.[8]

The Discussion Paper

2.3 The Discussion Paper develops a rationale for and a model for regulating broadcasting and broadcasting-like services. The rationale for regulating content 'lies in the power of broadcast services to influence public opinion and attitudes'. It says that the factors of general availability and immediacy 'have led to a perception' that such services have much greater power to influence than other media and hence 'should be subject to controls on content which need not apply to those other means'.[9]

2.4 However, all broadcasting and broadcasting-like services do not have controls on content because current legislation limits regulation according to the technical characteristics of the service, i.e. only radiocommunications services transmitting radio or television programs to the general public. Thus the case is developed for separating the regulation of technical matters from that of content. Regulation of content is to cover all services, old, new and proposed, is to be in a single piece of legislation and is supported because the product (programs) offered to audiences are identical.

2.5 The model for regulation is something new. The Paper says a central requirement for such a scheme (of service type content regulation) would be its ability to adapt quickly to cover new services or changed circumstances. It implies that traditional legislation cannot do this and that the current process is expensive, complex and repetitive.

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[8]PP 263/1988, pp.14-17.
[9]DP, para 2.2.3.

2.6 The alternative is to have an Act which has a central core of obligations applicable to all services covered and a number of 'modules' of obligations applicable to a particular service. Within each module, for example program standards, ownership and control rules, cross-media rules and so forth there would be different levels of requirements and each of these modules would be in different divisions of the Act. Thus it should be possible to identify the division of the Act (presumably also the particular level of requirement within that division) for any service or new service and add on any special provisions.[10]

Comments on the Discussion Paper

2.7 The discussion in the Paper is about legislative structures and the modular approach is presented as a superior alternative. It is clear that confining legislation to traditional broadcasting services is inadequate because technology has and will in the future make this inappropriate. Thus the point in the Paper, about the influence and impact of what is shown as being the basis for regulation, is well made. The choices then are between different regimes for different types of services all specified with the necessary detail in legislation or the modular approach.

2.8 The modular approach is a novel concept, but it is no more than that. The reader is told nothing about the details of the concept. For example:

- who will determine which new technologies go into which module;
- will it contain division or individual sections on standards; and
- will there be sub-modules to take care of variations within modules.

If the answers to these questions is the Tribunal, then the concept simply entrenches and increases its power. If it is to be the Tribunal one must concede that the Parliament is delegating an important policy-making function to a regulatory body.

2.9 The case for the modular approach is based on a number of assumptions. The first is that other alternatives cannot adapt quickly to cover new services or changed circumstances. This could result in considerable delays in the introduction of new services because of the time taken to pass legislation, or result in their operation under voluntary regulation like VAEIS is today.[11]

2.10 The Committee fails to see why the operation of a new service under a voluntary regime is so big a disadvantage that it requires a modular approach to regulation. Over and above this is the question of what the modular approach will achieve and whether there can be anything more than two basic types of services, 'free' and subscription. The former is familiar, has been in place for some time and consists of commercial, national and public broadcasters. The latter is relatively unfamiliar, is new and consists of domestic and non-domestic subscription television.

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[10]DP, pp.4-8.
[11]DP, paras 2.4.5 and 2.3.3.

2.11 If pay television (domestic, entertainment, subscription television) is introduced there should be separate and clear rules set for it. After all this should be the eventual outcome of both the Government inquiry and the Committee inquiry. One must question why other sub-sets of new services cannot be accommodated quickly within these two basic types. In other words the adaptability advantage of the modular approach is exaggerated at best.

2.12 The second argument for the modular approach is that the traditional model which inserts in legislation new provisions applicable only to a specific service 'is expensive in terms of both Parliamentary and Executive resources'.[12] As it applies to the Parliament, **this is a very dangerous argument**. The legislative function is one of the most important functions of the Parliament. Yet, on the basis of an unsupported assertion of being 'expensive', the Parliament is being asked to delegate decision-making in an important area of public policy to the Minister or to the Tribunal. It is the sort of proposal that tends to undermine the authority of the Parliament.

2.13 The modular approach may also contravene the Government's guidelines on the preparation of legislation. The legislation handbook says that legislation that confers open-ended discretions is likely to attract criticism in Parliament and that matters of detail and matters liable to frequent change should be dealt with by regulation.[13] The modular approach may not accommodate any of these criteria.

2.14 The third argument in favour of the modular approach is that the traditional model 'results in complex legislation with often considerable repetition of requirements basic to several services'.[14] The matter of complexity is asserted not argued and the Committee fails to see how the modular approach can reduce this complexity. On the contrary the approach could add to complexity because decisions on levels of requirements could be arbitrary. The argued advantage of reduced repetition is trivial. Such reductions are hardly a tangible benefit and could be accommodated within the traditional model by cross-references in the legislation.

2.15 The strongest argument against the modular approach is in the Discussion Paper itself! In the section on program content the Paper says that:

> ... it should be recognised that the confluence of technology **is leading inexorably to ever greater difficulty in defining modules.** This problem will increase with time ... making it harder and harder to regulate.[15] (emphasis added)

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[12]DP, para 2.4.5.
[13]Department of Prime Minister and Cabinet, *Legislation Handbook*, July 1988, Canberra, pp.16,19.
[14]DP, para 2.4.5.
[15]DP, para 6.3.14.

Conclusions

2.16 The Committee does not support the modular approach to legislation. As an alternative it is nothing more than an inadequately developed concept, supported by unsubstantiated assertions that do not stand up to close scrutiny. It is a dangerous concept because it seeks to remove from the Parliament the powers of decision-making in an important area of policy. The value of the modular approach is also exaggerated and the Paper argues against itself. The Committee sees no reason why regulation should not be extended to cover seperately subscription television services of one sort or another. Any repetition in legislation could be avoided by cross-referencing. If this cannot be done repetition, which after all results only in additional pages of an Act, is a price worth paying for the retention of parliamentary control.

3: OBJECTIVES OF THE ACT

The Committee Report

3.1 Prompted by the views of the Australian Broadcasting Tribunal and other witnesses, that policy objectives should be specified in the legislation, the Committee report examined this matter very carefully.

3.2 Comment in the report can be divided into four parts. First, the Committee said that care should be exercised in the setting (and wording) of objectives; otherwise there could be unintended consequences. Second, the report said that even if policy objectives are set out carefully problems remain. One problem is that of 'trade-offs': to achieve more of one objective one has to trade-off or accept less of another objective. Another problem is that objectives could be achieved in different ways and these include the alternatives of deregulation, self-regulation and regulation. Obviously, objective setting does not solve this problem.

3.3 Third, the report said that **by itself** (emphasis added) the inclusion of policy objectives in the Act will not clear uncertainty. Therefore, these objectives need to be accompanied by a more detailed Ministerial statement which explains how government proposes to implement the broad policy objectives contained in the Act. Appropriate recommendations were made.

3.4 The report went further. It discussed the primary responsibilities of governments, the Parliament and the Tribunal and then made the following recommendation:

> **Recommendation 3:** The *Broadcasting Act 1942* be amended to provide that, subject to judicial review by the courts and by the institutions of the administrative law, the role of the Australian Broadcasting Tribunal is to protect the public interest by -
>
> (a) undertaking those functions set down in the Act; and
>
> (b) having regard to the policy objectives in the Act and policy statements on broadcasting made by the relevant Minister pursuant to the Act.[16]

The Discussion Paper

3.5 The Discussion Paper says that the lack of specific legislative objectives has introduced tensions and uncertainties about priorities in the administration of the Act. These uncertainties are compounded apparently by the fact that many decisions '... involve value judgements by the Minister or ABT'. Other reasons are advanced for the inclusion of general objectives in legislation. These include:

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[16]PP 263/1988, pp.16-20.

- allowing for less detailed prescription of constraints consistent with a trend to deregulation, and

- enabling the Tribunal to have wider discretionary powers while maintaining proper safeguards.

3.6 The Paper gives examples of possible general objectives and accepts the concept of Ministerial policy statements with qualifications. It says these statements could never override the specific requirements of the Act.

3.7 The Paper proposes that 'appropriate legislative objectives for the system should be developed as one aspect of the safeguards for a more deregulated system'. Ministerial policy statements could supplement those objectives.[17]

Comments on the Discussion Paper

3.8 The Committee has three major criticisms of the discussion of objectives. The first thing to look for in this type of analysis is a clear relationship between the problem(s) identified and the solution(s) proposed. The Paper says that '(m)any decisions under the present Act and the majority under the proposed Act ... will involve value judgements by the Minister or the ABT'.[18] Now if this is a problem there is no explanation as to how objectives solve the problems. Do they (the objectives) reduce the number of value judgements or do they improve the quality of these judgements, and if so, how? But perhaps these are not the questions to pose. Value judgments are not part of the problem, the point was made in passing to illustrate the difficult task of the Tribunal.

3.9 The real problem as identified in the Discussion Paper is that '(t)he lack of specific objectives has introduced tensions and uncertainties about priorities in the administration of the Act which could be avoided'.[19] Now unless the Act specifies an overriding objective the last thing objectives can do is to give any indication whatsoever about priorities. As recommended by the Committee it is the Ministerial statement that can indicate priorities, and this requires as a prerequisite the setting of objectives. To put in Ministerial statements as optional, or supplementary as the Paper does, is to put the cart before the horse.

3.10 Of course reference can be made to tensions and uncertainties outside priorities. The question that has to be answered is whether policy objectives **solve** the problem or whether they **are** the problem. The Tribunal's 1984 report on satellite program services referred to the inherent tensions in objectives.[20] It is precisely the matter of trade-offs identified in the Committee report.

3.11 In short, the relationships or connections between the identification of problems and the solutions (policy objectives in legislation) in the Discussion Paper are either extremely tenuous or virtually non-existent. Its authors have

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[17]DP, pp.9-12.
[18]DP, para 3.2.1.
[19]DP, para 3.2.2
[20]Australian Broadcasting Tribunal, 1984 report on *Satellite Program Services, inquiry into the regulation of the use of satellite program services by broadcasters,* Vol. 1, pp.60,61, Canberra 1984.

passed up an opportunity for clarity by ignoring much of the Committee analysis, particularly the discussion on the primary responsibilities of governments and the Parliament vis-a-vis the primary responsibilities of the Tribunal and the relevant recommendation reproduced at paragraph 3.4. The Committee is left with the distinct impression that all this talk about policy objectives in legislation in the Paper is window dressing, a superficial and spurious justification for making the exclusive licensing criteria non-exclusive.

3.12 The second criticism is that it is simpler and clearer to put necessary change in the relevant place in legislation rather than to rely on the indirect method of objectives. Another reason given in the Paper for having general objectives is to 'enable the conferring of wider discretionary powers upon the ABT to allow it to discharge its duties and functions more flexibly, **while maintaining proper safeguards**'.[21] (emphasis added) There is no need to have general objectives in order to give the Tribunal wider powers associated with flexibility. One gives it these powers by making, for example, the exclusive licensing criteria non-exclusive or by allowing the Tribunal to determine its inquiry procedures. Such changes should be explained in terms of effectiveness and efficiency of the Tribunal's operations. It is difficult to see how they can be explained in terms of general objectives.

3.13 It is also quite absurd and extremely misleading to suggest that general objectives would serve to maintain 'proper safeguards' against presumably the misuse or inappropriate use of wider discretionary powers. **They can never do this**- the proper safeguards are the appeals processes.

3.14 The third major criticism is of the limitations of the objectives and objectives setting. If policy objectives are to be more than window dressing they should have a functional use, particularly if one of their major alleged purposes is to give the Tribunal general guidance on exercising discretionary powers.[22] For objectives to have a functional use they should be capable of being implemented or put into operation. It is when one looks at objectives that can be implemented that it becomes abundantly clear how limited objective setting is **by itself**. Two examples should suffice. The first is the objective of quality and diversity put in the following way in the Discussion Paper:

- to facilitate and encourage the improvement of the quality and diversity of programs and services available.[23]

3.15 In looking at ways to interpret and implement this objective it would be vital for the Minister to bring the Australian Broadcasting Corporation and the *Special Broadcasting Service into the picture and indicate where the national* broadcasters fit in in respect of quality and diversity. The same would need to be done for public broadcasters. The Minister could conclude that viewers (television) in service areas that receive the two national broadcasters and say three commercial broadcasters have, ipso facto, an adequate choice in respect of

[21]DP, para 3.3.5.
[22]DP, para 3.0.1.
[23]DP, para 3.3.6.

diversity of programs, so that there is no need to increase diversity of choice by regulation. This is the effective competition approach used for restricting rate regulation of pay television in the United States.[24]

3.16 If this effective competition approach is used then there would be no need for regulation in respect of adequate and comprehensive services, no need for 'performance reviews' or area inquiries for those markets (service areas) deemed by the Minister to be sufficiently competitive. If this approach is not used, or cannot be used for specific markets (areas), then there could be a case for such conditions, reviews or inquiries.

3.17 The purpose of the analysis in the two immediately preceding paragraphs is illustrative not prescriptive. It does not say that something should be done in a particular way. It does say that there are different ways of achieving an objective and by itself the existence of objective does not assist in the choice that has to be made.

3.18 The second example of the limitations of objective setting is to be found in a part of the fifth general objective in the Discussion Paper, namely:

- to protect the public interest by avoiding:
  - undue concentrations of media ownership or control.[25]

3.19 At present the Tribunal polices the legislation which limits the number of radio or television licences a person may own or control - the audience reach limits. But the exclusive licensing criteria does not give the ABT any scope whatsoever for taking concentration levels into consideration in its decisions on licence grants and transfers. In other words, the combination of audience reach limits and exclusive licensing criteria result in the concentration levels being both maximum and minimum.

3.20 The Tribunal wants the levels to be maximum only, achieved by making the licensing criteria non-exclusive. Then the ABT can refuse to grant or transfer a licence to a particular person on the grounds that to do so would result in undue concentration, although the maximum limits set in the Act would not be breached by such a grant or transfer.

3.21 This is a simple and straight 'yes' or 'no' question: should or should not the ABT be given such powers? If the answer is 'yes', or 'no', this should be made explicit in the legislation. Having an objective as imprecise as that of undue concentration does not answer the question of Tribunal power. The Committee has already answered this question in the negative. The report (under Licence Grants - The Exclusive Licensing Criteria) made it clear that giving the Tribunal power to determine concentration levels could result in one awful mess.[26]

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[24]Turner Broadcasting System Inc., *Broadcasting/Cablecasting Yearbook 1987*, p.D-1.
[25]DP, para 3.3.6.
[26]PP 263/1988, paras 4.29-4.36.

3.22 It is disappointing that the authors of the Discussion Paper could not see their way clear to use such an approach. By comparison, use of phrases and words such as 'wider discretionary powers', 'protect the public interest' and 'flexibility' as justifications for having policy objectives in legislation is both obfuscatory and misleading.

Conclusions

3.23 In respect of objectives in the Act the Discussion Paper is a poor piece of analysis. It is confusing, misleading and lacks a sound rationale. The Department of Transport and Communications should make a fresh start. It should insist on consistency and clarity in the identification of purpose. No amount of word juggling can hide the obvious inconsistency of having objectives in legislation to give the Tribunal guidance in exercising any discretions, which gives more power and, having objectives in the legislation as a safeguard for a more deregulated system, which reduces power. The Department should re-think its position on objectives and recognise and accept that the Ministerial statement as recommended by the Committee or legislative certainty are the safest and clearest ways of giving the ABT guidance on its role and functions.

4: PLANNING OF SERVICES

The Committee Report and the Discussion Paper

4.1 The planning of services was not a matter dealt with in the Committee report although some evidence was taken on the subject. Such planning may be relevant for the current inquiry into new broadcasting-related services.

4.2 The proposal in the Discussion Paper is for an integrated plan to be prepared at the system planning stage. The plan would specify overall priorities and objectives for the communications sector as a whole, and would indicate for any area the number of services that are available and are planned. In addition it would spell out how the planning process would work and so forth. The regulation of the means of delivery would be separated from the regulation of the social impact of services.[27]

Comments on the Discussion Paper

4.3 Before the need for an integrated plan is accepted it is necessary to know the deficiencies of the current system. There is a section in the Paper called 'Problems with the Current System' which does not identify any problem or deficiency! Instead, the reader is given a rationale for an 'integrated approach' based on spectrum scarcity, the need to avoid interference, the importance of communications and information services and the growth of private sector communication services.

4.4 Apparently this adds up 'clearly ... (to) the need for an integrated approach to the provision of all communications services'. Circumscribing all this is the argument that government rather than an 'expert body' should have responsibility for technical matters which are extended to cover cable services.[28]

4.5 The Minister and the Tribunal have different, perhaps complementary roles. The Minister can limit the powers of the Tribunal and the Tribunal's area inquiries are to be 'one notable ... input' in the identification of the service needs of particular areas.[29] Yet, although the Paper does not tell the reader, that there are 103 service areas for commercial radio and 50 commercial television licences.[30] Without a massive increase in or redeployment of Tribunal resources it is difficult to see how the outcomes of area inquiries can feed into the preparation of a plan. This problem could be compounded because such inquiries are to be 'diagnostic and not prescriptive'.[31]

4.6 All that could be done is to reserve space on the spectrum for such outcomes but this in turn raises the question of whether such reservations defeat the purpose of planning and the integrated approach.

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[27]DP, pp.13-21.
[28]DP, para 4.2.7.
[29]DP, paras 4.4.6 and 4.4.8.
[30]PP 263/1988, paras 2.26 and 2.27.
[31]DP, para 7.3.26.

Conclusions

4.7 The Committee is a bit cold on the integrated planning approach for three reasons. First, there is insufficient explanation of why the existing Ministerial method is deficient. Second, it appears that the Tribunal's area inquiries are going to be a major input into the planning process and therefore would have to cover **all** communications services. These inquiries would thus range far and wide and go beyond even a more expansive definition of broadcasting. Area inquiries could cover cable as provided by Telecom which could be then asked to provide new services in the particular area as part of its community service obligations.

4.8 The third problem relates to costs. The research costs for services which people pay for should be met by the service providers. If area inquiries or other types of Tribunal inquiries are going to establish need on the basis of market research the costs could be enormous.

4.9 Integrated planning looks very much like a backdoor entrance for Tribunal input into policy development on communications matters outside broadcasting, and policy matters relating to new services. A lot of thought and examination should be given before the final seal of approval.

5: ALLOCATION OF LICENCES

The Committee Report

5.1 The Committee report dealt with licence allocation under its first term of reference, namely, the role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector with particular reference to the basis and conditions upon which licences are granted and renewed, and options for change.

5.2 In respect of licence grants the report discussed balloting as a means of awarding licences, commercial viability and the exclusive licensing criteria. By comparison the Discussion Paper has a more comprehensive discussion of licence allocation, partly because of its wider application - the Committee was restricted to the commercial broadcasting sector.[32]

The Discussion Paper

5.3 The Discussion Paper identifies two main areas of difficulty, the allocation scheme and the (exclusive) licensing criteria. It discusses the disadvantages and problems of the scheme of allocation by 'merit', or, what the Americans call 'allocation according to a public interest standard'. It lists a number of 'adverse consequences' of the exclusive licensing criteria and discusses at some length the relevance of having a commercial viability criterion, saying it is a substantial issue and concluding that the role of viability in the planning and licensing process could be re-examined.

5.4 The Discussion Paper examines 5 options for licence allocation under revised legislation - merit plus an establishment fee, tender (2 options), auction and first-come-first-served. It also discusses how reform of the exclusive licensing criteria should be handled where the merit system is retained, or where the Tribunal has a role. The Paper favours a tender system rather then the current merit system, with the exception of public licences. Even with tender it sees a role for the Tribunal. Where the ABT is left with a major role, the Paper wants the criteria to be non-exclusive.[33]

Comments on the Discussion Paper

5.5 The Discussion Paper displays a lot of concern about the retention of commercial viability as a licensing criterion. It says that the concept 'rests on the assumption that the market for broadcasting services should not be a free one', that it forms a barrier to entry, that it could conflict with important broadcasting policy objectives such as diversity of choice in services and that it conflicts with a general government objective of promoting free markets. At the licensing level it increases the complexity of inquiries, the costs to participants, the amount of litigation and delays in the delivery of new services.[34]

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[32]PP 263/1988, pp.37-45.
[33]DP, pp.22-32.
[34]DP, paras 5.2.9, 5.2.10 and 5.2.11.

5.6 A surprising and disappointing thing about this analysis is that it **ignores completely** the contrary point of view, particularly that put forward by industry: that increased competition will reduce advertising revenues and this in turn will affect the quality of television programs. It is an argument which has been extended more recently to cover the introduction of pay television. This is not an argument the Committee necessarily accepts. It is an argument that has to be countered if commercial viability is to be removed.

5.7 The analysis also ignores the relationship between the costs of social responsibilities borne by licensees and the protection of commercial viability. There are at least three aspects to this relationship. The first and second are whether it is equitable or consistent with the principles of competition to remove barriers to entry and, at the same time, require all licensees to bear:

(a) through current regulation the cost disadvantages of showing programs they would not have shown or shown to the same extent; or

(b) through future regulation (eg area inquiries) the cost disadvantages of showing such programs?

5.8 The third point is somewhat different. If licensees are required to accept social responsibilities they pay for out of revenue, is it equitable to require them to continue to discharge these responsibilities and also for government to permit the introduction of new services such as pay television which competes with and therefore can take market share (audience levels) away from commercial broadcasters? The problem is compounded if it is not possible or desirable to impose the **same requirements** on the new services. This seems to be a fundamental question in the debate on protecting commercial viability versus promoting competition. It is **ignored completely** in the Discussion Paper.

5.9 The Discussion Paper argues against the exclusive licensing criteria which it wants made non-exclusive. It advances three reasons for non-exclusiveness none of which are convincing. The first argument is that 'some public interest questions cannot be addressed' by the exclusive criteria, for example:

> 'the **personal qualities of employees**, which may be of fundamental importance to a broadcasting service'.[35] (emphasis added)

5.10 The Committee is very disturbed by this example which appears to be an extension of the 'fit and proper' criterion to each and every employee of a commercial broadcasting station. The example has a whiff of McCarthyism about it and could end up being extremely draconian, particularly if appeals to the Administrative Appeals Tribunal are abolished as is proposed in the Discussion Paper. The combination could open the door to misuses of power and even infringe on the civil liberties of Australians employed in commercial broadcasting.

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[35]DP, para 5.2.7.

5.11 The second objection to the exclusive licensing criteria is the inhibition of 'full public participation in inquiries'.[36] What this means according to the Tribunal is that persons cannot raise an issue that is not relevant to the exclusive criteria although the issue may be of broader relevance in the particular case.[37]

5.12 It should be recognised that this argument is based on the inappropriateness of the exclusive criteria. It is not an argument that stands on its own because obviously the criteria do not deny public participation. They deny **full** participation. There is a skilful play on words in this argument.

5.13 The third argument is that the criteria promote a legalistic approach and judicial review has become common. The results are increased costs and delays in the commencement of new services.[38]

5.14 Are the deficiencies a product of the exclusive licensing criteria or a product of the merit system of awarding commercial radio and television licences? The Discussion Paper says that 'selection of the "most suitable" applicant ... **inevitably involves subjective and discretionary judgements**' (emphasis added) and that the Tribunal 'must make fine distinctions between many eligible applicants in order to choose the "best" applicant'.[39] To this must be added what the Discussion Paper does not include, the massive windfall gains worth millions of dollars that accrue to the success ful applicant as a direct result of the merit system.

5.15 In these circumstances it is no wonder that legalism and legal challenge exists, and probably will continue to exist irrespective of whether the criteria are exclusive or not.

5.16 In the United States the Federal Communications Commission (FCC) awards television licences under a 'public interest standard' which appears similar to the Australian merit system. It appears that the criteria used are non-exclusive and the FCC decision on the successful applicant is subject to court review, essentially to determine whether the decision is 'reasonable'.

5.17 Breyer says that many of the problems plaguing public interest allocation (in the United States) arise from two conflicting drives that the system generates. The first is the development of objective standards to select the winner and the second is the exercise of subjective judgement in the application of those standards. Subjective judgements are a managerial skill often in conflict with the legal drive towards certainty and rational justification. It is also said that this conflict leads inexorably to complicated procedures where the range of possible

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[36]DP, para 5.2.7.
[37]Submission no 3153 of 27.1.88, p.8. This Tribunal submission was made to the Committee's inquiry into the role and functions of the ABT.
[38]DP, paras 5.2.7 and 5.2.11.
[39]DP, para 5.2.4.

issues broadens and the amount of relevant evidence grows exponentially. The result is contested licence proceedings which take over two years to resolve, with many hotly contested hearings lasting much longer.[40]

5.18 One must question whether this emphasis on the exclusive licensing criteria is both exaggerated and misplaced because of the alternatives to the merit system as a means of awarding licences. The Discussion Paper proposes five options for awarding licences of which merit plus an establishment fee is one. The preference is for a tender system.

5.19 The discussion of these options is one of the strengths of the Paper. The advantages and disadvantages of each option are set down concisely and clearly and the sensible conclusion is drawn that the allocation scheme used would depend on the characteristics of the particular service; in other words, the 'horses for courses' approach which fits into the 'modular' approach to regulation proposed in the Paper.

5.20 It is interesting nevertheless to address a matter the Discussion Paper is silent on: the characteristics of the courses for which particular horses are selected. One could divide licences into commercial and non-commercial and agree with the Paper that for the latter some sort of merit system would be necessary. For commercial licences the work of the Tribunal would depend on at least three things or criteria - the importance of non-commercial requirements, the characteristics of the service and the abundance or scarcity of capacity. The choice of a particular scheme would depend on the weights one places on these factors. If, on the one hand, non-commercial requirements are important, there is no close relationship between viewer and provider and capacity is scarce, the Tribunal could have a significant role and merit selection with an establishment fee may be appropriate. If, on the other hand, non-commercial requirements are not important or can be handled separately, there is a clear and close relationship between viewer and provider and capacity is abundant (or scarce), there may be a very limited role for the Tribunal, or no role at all, and the tender system with minimal Tribunal role can be used.

Conclusions

5.21 The Discussion Paper suggests that commercial viability be removed as a licensing criterion. This applies more to new services than additional commercial channels for free-to-air. The analysis is incomplete, fails to rebut industry arguments and fails to recognise the importance of not discriminating against a particular delivery system if market entry is not to be conditioned by commercial viability.

5.22 The arguments against the exclusive licensing criteria are once again not convincing. The Committee report did not accept the relevance of arguments put forward by the Tribunal in support of making the exclusive licensing criteria non-exclusive. Instead, the report argued that the criteria 'cannot always cover all the circumstances of each and every case', that this applies more to grants than

[40]S Breyer, *Regulation and Its Reform*, Harvard University Press, Cambridge, Massachusetts, 1982, pp.71-95.

renewals or transactions and recommended accordingly. It is important to note that the Committee supported continuation of appeals to the AAT against Tribunal decisions.

5.23 The arguments advanced in the Discussion Paper for removal of exclusiveness are not convincing. One of them is positively dangerous. Unless there are procedures which act as a check on the misuse of power, **the Committee cannot support the removal of the exclusive licensing criteria**, however great the so-called adverse consequences are said to be. These checks could be the continuation of appeals to the Administrative Appeals Tribunals or the American system of court appeals against decisions not considered to be 'reasonable'.

5.24 The analysis on options for allocation of licences is one of the few bright spots of the Discussion Paper. It is important, nevertheless, for criteria to be developed to allow rationale rather than arbitrary choice between options.

6: PROGRAM CONTENT

The Committee Report

6.1 The Committee report dealt with program content under its third term of reference, namely, the role and functions of the Australian Broadcasting Tribunal in regulating the commercial broadcasting sector with particular reference to the role of the ABT in establishing and enforcing program and advertising standards.

6.2 The report discussed children's tv programs, Australian content, violence on television and advertising standards. Because these matters had been or were being covered by Tribunal inquiries the report did not make any recommendations. The conclusions drawn supported the status quo.

6.3 The report did make recommendations in this area to bring the Australian Broadcasting Corporation and the Special Broadcasting Service under the ABT by making them subject to all the powers of the Tribunal to regulate program standards. When enforcing such standards the Tribunal was asked to take in to consideration the special responsibilities of the national broadcasters.[41]

The Discussion Paper

6.4 The Paper describes the present system and draws the conclusion that different types of services will require different levels of regulation which the current regime cannot handle. It is said that '(a)ny new system must continue to have program standards and a means of ensuring compliance ... because the public will demand them'.

6.5 Any standards would need to be in accord with the defined regulatory objectives proposed for the Act and be modular for flexible operation. The best way to do this is to relate standards in terms of potential audience and program type rather than technology. Thus some services would be more regulated than others.[42]

Comments and Conclusions on the Discussion Paper

6.6 This is a very general discussion about the setting of standards buttressed by the false dawn of certainty that emanates from the inclusion of policy objectives in legislation.

6.7 The approach of leaving everything to the modular approach does nothing to advance the need for and type of regulation in this area of program standards. An examination of the information in the Discussion Paper indicates that there are some standards or rules, such as the prohibition of the advertising of cigarettes or cigarette tobacco, which would apply to any type of service. Other standards or rules would not have universal application and the need for and type of

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[41]PP 263/1988, pp.75-90.
[42]DP, pp.33-38.

regulation may well depend on the type of service; for example, adequate and comprehensive services, Australian content, program classifications, childrens' programs and advertising.

6.8 What is needed for analytical purposes is the establishment of criteria which can be applied to determine the type of regulations for specific services. Platitudes on the modular approach are a poor substitute.

7: PERFORMANCE REVIEW

The Committee Report

7.1 The Committee report did not deal with performance review as such. Under a sub-heading of Licence Renewals it discussed extension of the licence period, area inquiries and network licensing. In a later chapter the report recommended a limited type of competitive licence renewal.

7.2 The report recommended against an extension of the licence renewal period. It supported area inquiries pointing out that they could identify minority tastes or gaps because the relevant programs do not earn sufficient revenue to make them an economic proposition. It argued that there should be separate inquiries for television and radio, that sub-section 18A(1) of the Act should be amended accordingly and then brought into operation.

7.3 The report recommended against network licensing but called for an inquiry into the minimum hours of local programming a licensee must transmit. The report called for an assessment of the costs and benefits of reducing the number of networking hours.[43]

The Discussion Paper

7.4 The Discussion Paper relates licence renewals to the concept that a licence is held in trust (so that the trustees have to account periodically for their stewardship of the licences). Basing its views on outcomes of the renewals process the Paper says that in most cases there is little or no apparent benefit commensurate with the costs.

7.5 The Paper concludes that renewal is the norm, but what occurs in practice is a performance review which therefore should be recognised in its own right rather than under the guise of a licence renewal. Performance review is also supported because the present system does not reflect some of the characteristics of broadcasting, namely, the increasing importance of networks, that the majority of programming is not specific to an individual service and that the comprehensiveness of services in an area depends on the totality of services in that area.

7.6 Discussion on options centres on competitive licence renewals, increasing the licence period and three types of performance reviews - area, network and topic. These reviews are intended to cover all types of broadcasting.

7.7 A scheme proposed in the Discussion Paper is to:

(a) grant and renew licences for five years;

(b) permit automatic renewal if relevant performance reviews support this course;

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[43]PP 263/1988, pp.45-57 and 99-103.

(c) permit area, network and program inquiries at the discretion of the Tribunal, the outcome of which - depending on the findings - might be reflected in new standards or conditions on individual licences; and

(d) allow the Tribunal to take advantage of the overlapping nature of its inquiries.[44]

Comments on the Discussion Paper

7.8 'Performance Review' is a very impressive phrase, well suited for a heading in legislation. But before anything can be endorsed or rejected there are some very important matters that should be discussed and resolved.

7.9 The first is to unravel the meaning that 'a (broadcasting) licence is granted in trust and does not have the character of property' and therefore does not amount to 'a property-type right'.[45] If this is only a justification for licence renewals it is not something to be concerned about, except to point out the Committee comment that the public trustee model of regulation is in danger of becoming obsolete.[46] However, the Discussion Paper wants to 'restore' the concept and it is necessary to be very clear as to what is being 'restored', or, introduced.

7.10 An impression gained is that because a licence does not amount to 'a property-type right' the Tribunal does not have to consider profitability or economic viability when setting standards or conditions as a result of performance reviews. It should be noted that the Paper wants appeals from Tribunal decisions to the Administrative Appeals Tribunal to be abolished.

7.11 If this impression is correct, it represents a fundamental change in broadcasting policy. It is a legalistic approach which ignores the significant investment in infrastructure and other capital, and which also uses shareholders funds for which a return is expected. It is therefore an approach that requires careful examination. If the impression is not correct the Tribunal should be **required** to take profitability or economic viability into consideration before including new standards or conditions on licensees.

7.12 The second matter of importance relates to the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). The Discussion Paper acknowledges the problems in respect of area reviews. It also exists in respect of networking and it is difficult to see how the ABC should be treated differently.

7.13 The Paper says the 'approach to performance reviews may be more relaxed where real competition exists'.DP, para 7.3.31. This is an approach worth exploring and could be handled by the Minister indicating whether there is effective competition in a particular service area (market).

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[44]DP, pp.39-45.
[45]DP, paras 7.1.1, 7.2.4 and 7.4.4.
[46]PP 263/1988, para 3.34.

Conclusions

7.14 The Discussion Paper has a comprehensive formula for performance reviews but fails to give the reader a definition of performance. As a consequence it fails to recognise or accept that in the commercial broadcasting sector performance is measured in terms of viewer or listener acceptance. Thus the Paper fails to relate this reality to its reviews. In a section, The Case for Program Regulation, the Committee report said that 'the role for regulation is essentially one of fine-tuning'.[47] It appears that by its inadequate treatment of viability and its 'restoration' of the concept of the public trustee the Paper is attempting something much more than fine-tuning.

7.15 This is a matter that needs to be clarified. The place of the ABC and SBS are referred to in passing and the place of competition, particularly aggregation and pay television, are not worked into the new scheme of regulation. Unless these things are done, the new scheme of performance review will raise as many problems as it is intended to solve.

[47]PP 263/1988, para 3.47.

8: SANCTIONS

The Committee Report

8.1 The last chapter of the Committee report, Enforcing Standards and Sanctions, dealt with part of its third and all of its final term of reference. Briefly, the report said that there should be clear and clearly understood linkages between standards, methods of checking whether the standards are being observed and, if they are not, methods for enforcing compliance.

8.2 The Committee found the methods of checking whether standards are being observed to be deficient and recommended that the Tribunal institute a system of random spot checking to detect breaches of program standards and licence conditions. It examined whether the existing methods for enforcing compliance were adequate and found the current sanction powers available to the Tribunal to be appropriate and adequate. However, because of a lack of public understanding as to how the system works a public education campaign was recommended.[48]

The Discussion Paper

8.3 The Discussion Paper identifies four major deficiencies in the mechanisms 'to punish and deter non-compliance':

- no prosecutions for offences;
- the main licensing sanctions are excessive for use in most situations;
- procedural constraints on the exercise of some sanctions; and
- a view that the ABT's current practical sanctions are not adequate.

8.4 The proposal is to increase the sanctions available to the Tribunal by including some or all of the following sanctions:

(a) in relation to individual licensees:

- shortening the term of licence mid-term;
- restricting the amount or timing of paid advertisement;
- making orders and probationary orders;
- placing restrictions on programming;
- imposing fines or automatic penalties;
- competitive licence renewals; and

[48]PP 263/1988, pp.91-99.

(b) in relation to networks:

- directions to networks;
- restrictions on network advertising;
- pre-classification of network programs; and
- directions on changes to network arrangements.[49]

Comments on the Discussion Paper

8.5 The Discussion Paper refers to the Committee's conclusion, that the current sanctions available are appropriate and adequate, and then proceeds to ignore that conclusion by proposing consideration of a large extension of Tribunal powers intended 'to punish and deter non-compliance'. Once again there is very little relationship between the problems identified and the solutions offered.

8.6 The first perceived problem is that there have been no prosecutions for offences.[50] This is a bit like saying that capital punishment has been unsuccessful because no one has been hanged! Reading between the lines one gets the impression that Ministers of the Crown have failed to initiate prosecutions. The proposal is to remove this step by giving the Tribunal the power to go directly to the Director of Public Prosecutions. This may solve the perceived problem. Of course there is an alternative; and that is for the Tribunal to publish all breaches it has brought to the attention of the Minister. The large increases in the powers of the Tribunal, however, have nothing to do with this matter of how prosections should be handled.

8.7 The second major perceived problem is that the main licensing sanctions (revocation of licence, etc) are excessive for use in most situations.[51] The generality of the comment precludes identification of the problem or isolation of the particular proposed sanctions which are required to be applied to the problem.

8.8 The same could be said of the third major deficiency - procedural constraints on the exercise of some sanctions.[52] But beyond this, surely, if there are constraints should not they be identified along with the means of removing the constraints? This has not been done and the reader is left to guess which of the proposed new sanctions remove the constraints.

8.9 The fourth perceived major deficiency 'is a view that the ABT's current practical sanctions are not adequate'.[53] In other words, someone's unexplained view of inadequacy is transformed into a problem which requires attention! This is preposterous. It reflects on the competence or otherwise of those who prepared this section of the Discussion Paper.

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[49]DP, pp.46-50.
[50]DP, para 8.2.1.
[51]DP, para 8.2.1.
[52]DP, para 8.2.1.
[53]DP, par a 8.2.1.

8.10 Another criticism in the Paper is that licensees are held responsible for breaches in program standards when actual responsibility may lie with "the network".[54] If this is true the solution is straightforward: change the legislation by requiring the network to take responsibility for the breach. But this appears to be the last thing the Paper wants to do. Its proposals do not deal with changing the location of responsibility; they give the Tribunal powers over networking. The Committee questions how the pre-classification of network programs or Tribunal-directed changes to networking arrangements can be associated with making networks rather than individual licensees responsible for breaches in program standards.

8.11 The Discussion Paper has a passing comment on the Committee's recommendations on sanctions. It says that the recommendations on spot monitoring and maintenance of records 'could have considerable resource implications for the ABT, which would have to be assessed in terms of its overall priorities'.[55]

8.12 This is a traditional method of ignoring a recommendation from a parliamentary committee! The response also ignores the fact that the Tribunal already does some of this work - in commercial radio in respect of Australian content and in public broadcasting (radio) in respect of breaches of sponsorship rules. Thus spot monitoring could be confined to television and a limit put on costs. Given what is said about networking the spot monitoring would have an application wider than the station(s) being monitored.

8.13 The considerable resource implications argument is exaggerated. It also ignores the availability of resources that would be released from the changes to ownership and control procedures recommended by the Committee.

8.14 If spot monitoring is to be rejected on the grounds of costs and priorities, this means that every other project undertaken by the Tribunal should have a higher priority. This is not true in respect of some of the current priorities of the Tribunal.

8.15 *Broadcasting in Australia* is a glossy publication put out by the Tribunal. Available information indicates a first year loss of between $35,000 and $53,000. Because initial set-up costs were incurred in the first year the expectation is for costs of production to decline in the future. Unless sales increase significantly the Committee would not be at all surprised if the accumulated losses increase over time.[56]

8.16 *Broadcasting in Australia* is seen as an adjunct to the Tribunal's annual report, a publication 'a bit more accessible and a bit more readable for the general public' than the latter. At $20 a copy one must question accessibility.[57]

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[54]DP, para 8.2.2.
[55]DP, para 8.3.15.
[56]Senate, *Debates*, 3 April 1989 (Estimates Committee B), pp.B35-B37. The figures of $35,000-$53,000 have been derived from information in these debates.
[57]Senate *Debates*, p.B36.

The document is a public relations exercise for a high profile organisation and accumulated losses on its production and sale would be an indictment of how priorities are handled.

Conclusions

8.17 The quality of the discussion on sanctions is poor. The Paper proposes strong sanctions such as fines, penalties, restrictions on the amount of advertising and restrictions on programming yet offers no clear or cogent reasons for such measures. The prescriptions are punitive, their purpose is to punish offenders, rather than to improve the quality of the service.

8.18 The Committee rejects all the proposals on sanctions made in the Discussion Paper. Once again the Department of Transport and Communications should start with a clean slate, detail the deficiencies of the existing sanctions and then connect its proposals to the identified deficiencies. The dominating purpose of change should be to improve quality not 'to punish' as mentioned in the Paper.

9: OWNERSHIP CHANGES

The Committee Reports

9.1 Ownership and control matters were discussed in both Committee reports on the role and functions of the Australian Broadcasting Tribunal. In the first report (the main report) the Committee examined the role of the ABT in relation to changes in ownership and control of commercial broadcasting licences.

9.2 In that report the Committee enunciated a recognised principle, namely, that the fundamental purpose of the ownership and control regime is to protect the integrity of the licensing system. This could be achieved only by the Tribunal being satisfied that the new owners met all the criteria of suitability required of applicants for (new) licences.

9.3 The application of this principle was affected by two factors. The first was the abandonment in 1981 of the system of prior approval so that today full application for approval of transaction changes is considered only after the transaction has been completed. The second factor was the administrative burden (unnecessary costs) resulting from the requirement that every share transaction which leads to an increase in a prescribed interest must be lodged with the Tribunal and later be subject to inquiry.

9.4 The report recommended a 'preferred package' of action to overcome these problems. A 'trustee' system would provide sufficient safeguards in the case of transactions transferring real control of a licensee, and would mean that the integrity of the licensing process could be protected without reverting to prior approval for share transactions.

9.5 The unnecessary costs of share transactions was tackled by the 'hurdles' approach of fixing certain levels of shareholding and voting interests (e.g. 15%, 30%, etc of the relevant class of interests) such that whenever acquisition took a person over a 'hurdle' an inquiry would have to be held.[58]

9.6 The main purpose of the second report (the supplementary report) was to extend the trustee system to cover the interests in licences held by persons who are found later by the Tribunal to be no longer eligible or otherwise unsuitable to hold those interests.[59]

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[58]PP 263/1988, pp.59-74.

[59]Australia, Parliament 1989, *The Role and Functions of the Australian Broadcasting Tribunal, Supplementary Report: Report from the House of Representatives Standing Committee on Transport, Communications and Infrastructure*, Parliamentary Paper, No 114/1989, Canberra.

The Discussion Paper

9.7 The Discussion Paper has a fairly lengthy and careful examination of the problems of the current ownership and control regime. Briefly, it finds the scheme not to be efficient or effective because monitoring is of minor or irrelevant changes, is both complex and inadequate and requires a large amount of resources - that of the Tribunal and the industry.

9.8 The Paper discusses at some length various options 'for improving and rationalising provisions dealing with control, ownership and cross-media limitations'. These options are increasing the power of the ABT, giving the Tribunal discretionary power, limiting transactions requiring ABT inquiry, strengthening the approval process and rationalising and simplifying tracing methods.

9.9 Changes are advocated in order to improve the efficiency and effectiveness of resource use by:

- rationalising rules and removing unnecessary regulatory measures; and
- giving the Tribunal discretion and adequate powers for more effective regulation of ownership and control rules.[60]

Comments on the Discussion Paper

9.10 The Discussion Paper makes a worthwhile contribution to the resolution of difficulties in ownership and control matters and with two exceptions there should be common ground between the industry and most others. The first is the trustee system. The second is giving the Tribunal discretion to monitor changes in control or influence over a licensee company.

9.11 What this discretion appears to mean is that the Tribunal can 'take into account network arrangements and agreements to ascertain whether substantial influence over the operations, management and programming schedules of a licensee, tantamount to control over the latter exists and, if so, to intervene in that arrangement and issue orders, as appropriate ... or vary the conditions of the licensee's licence ...'[61]

9.12 There is a pattern to all this but regrettably it has to be inferred. The Discussion Paper is not explicit but it wants to regulate and thereby reduce the amount of networking on commercial television. This is to be achieved by network reviews which recognise that networks are increasingly important. The initial step in the process is the registration of networking arrangements with the Tribunal which incidentally is what the Committee recommended. Registration, in the words of the Paper, 'would enable remedies for deficiencies to be targeted efficiently'.[62]

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[60]DP, pp.51-63.
[61]DP, para 9.3.3 (c).
[62]DP, para 7.3.19.

9.13 There is clearly an assumption or presumption in the Discussion Paper that the level of networking is 'too high' and that remedial action is required. Thus, assumptions/presumptions are substituted for reasoning and a 'network of regulation' is built on this basis. It extends from performance reviews into sanctions and then onto ownership and control matters.

9.14 The main report called for an inquiry into the need to set minimum hours of local programming that licensees must transmit. This was preceded by a discussion of the economic benefits of networking.[63] It appears that the recommendation has been superceded by the 'network of regulation' in the Discussion Paper which ignores the discussion on economic benefits.

Conclusions

9.15 The discussion and solutions to the problems of ownership changes is another of the few bright spots of the Discussion Paper. But it is important that there be developed a clear policy on networking. It is not good enough to hide behind phrases such as 'intervention .. in the public interest' and tying the 'public interest' test to policy objectives in legislation, giving the Tribunal discretion and so forth. The policy should be based on reasons for regulating networking and as far as possible the extent of regulation should be made explicit.

[63]PP 263/1988, paras 4.79-4.84 and 4.91.

10: LEGALISM AND INQUIRY PROCEDURES, AND THE APPEALS PROCESS

The Committee Report

10.1 Although evidence was taken on the uniform inquiry procedures the report did not comment on this subject. There was a detailed discussion on appeals from Tribunal decisions to the Administrative Appeals Tribunal.

10.2 Briefly, the Committee report saw appeals as part of an accountability process: the accountability of the ABT to the Administrative Appeals Tribunal for the quality of ABT decision-making. The report gave reasons for disagreeing with the two major arguments put forward for abolishing appeals to the AAT - the public inquiry process and expert body arguments - endorsed the view that review on the merits is (and should be) part of an accountability process and doubted whether any Parliament would give any regulatory body greatly increased power **and** reduce the accountability of that body.[64]

The Discussion Paper

10.3 The Discussion Paper refers to the inflexibility of current inquiry procedures and proposes the ABT be given flexibility to control its own proceedings by, for example, allowing it to make orders governing its procedures. In respect of the appeals process the Paper repeats arguments of the past and argues that AAT review should be removed from the Broadcasting Act on the basis of the unnecessary duplication of appeal paths.[65]

Comments on the Discussion Paper

10.4 It does appear that there is a case for more flexible and adaptable inquiry procedures but it does not necessarily follow from this that the Tribunal should be given the power to govern its own procedures. Nor does it follow that if the Tribunal is to be given such powers they should not be subject to disallowance by either House of the Parliament.

10.5 The Tribunal has not been keen on this latter process noting that its Canadian counterpart did not have a 'fetter' of a parliamentary power of disallowance.[66] The Paper says the Administrative Review Council is undertaking a major review of the regulation.

10.6 The loss of parliamentary supervision is not something to be taken lightly. Irrespective of what the ARC does or recommends, there should be parliamentary control of this matter and perhaps the Parliament should be calling on the experience and expertise of the Senate Regulations and Ordinances Committee.

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[64]PP 263/1988, pp.31-36.
[65]DP, pp.64-66.
[66]Submission no 4095 of 31 August 1988, p.1. This Tribunal submission was made to the Committee's inquiry into the role and functions of the ABT.

10.7 Both the Department of Transport and Communications and the Australian Broadcasting Tribunal have been long time advocates for removing the power of the Administrative Appeals Tribunal to review decisions of the ABT. The steering committee has been drawn only from these two organisations. It is not surprising that the Paper reflects their views. It does so by repeating arguments for abolition rather than countering the opposite point of view. It talks about AAT review reducing 'the status of the ABT'.[67]

10.8 Once again the quality of analysis is poor. The worst aspect of it is that **the Discussion Paper argues against itself.** On the one hand it claims the ABT to be an expert body. On the other it admits to the Tribunal making value judgements:

> (m)any decisions under the present Act and the majority under the proposed Act ... **will involve value judgements by the Minister or the ABT.** (emphasis added)
>
> selection of the 'most suitable' applicant in the second stage of the ABT process **inevitably involves subjective and discretionary judgements.** (emphasis added)[68]

10.9 Obviously, the admission that many decisions will 'involve' value judgements takes almost all the gloss from the expert body argument which is exposed for what it is - people with more than average knowledge pretending to be the font of all wisdom.

Conclusions

10.10 The bits and pieces of the various sections of this Discussion Paper add up to a very damaging total. An intended trend towards deregulation (less regulation) ends up by giving the Australian Broadcasting Tribunal more powers (more regulation), punitive powers, and, at the same time, reduces the checks on the misuse or abuse of power.

10.11 All this amounts to virtually unfettered power. The Committee would be dismayed if this is what the Parliament gives the Australian Broadcasting Tribunal.

JOHN SAUNDERSON, MP
Chairman
30 August 1989

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[67]DP, para 10.8.1.
[68]DP, paras 3.2.1 and 5.2.4.